



THE UNIVERSITY *of* EDINBURGH

## Edinburgh Research Explorer

### Law and Economics, David Hume and Intellectual Property

**Citation for published version:**

MacQueen, H 2011 'Law and Economics, David Hume and Intellectual Property' Edinburgh Law School Accepted Papers Series, no. 2011/09, University of Edinburgh, School of Law, Working Papers.  
<[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1791789](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1791789)>

**Link:**

[Link to publication record in Edinburgh Research Explorer](#)

**Publisher Rights Statement:**

© MacQueen, H. (2011). Law and Economics, David Hume and Intellectual Property. SSRN: University of Edinburgh, School of Law, Working Papers.

**General rights**

Copyright for the publications made accessible via the Edinburgh Research Explorer is retained by the author(s) and / or other copyright owners and it is a condition of accessing these publications that users recognise and abide by the legal requirements associated with these rights.

**Take down policy**

The University of Edinburgh has made every reasonable effort to ensure that Edinburgh Research Explorer content complies with UK legislation. If you believe that the public display of this file breaches copyright please contact [openaccess@ed.ac.uk](mailto:openaccess@ed.ac.uk) providing details, and we will remove access to the work immediately and investigate your claim.



# University of Edinburgh

School of Law

Working Paper Series

No 2011/09

## **Law-and-Economics, David Hume and Intellectual Property**

**Hector MacQueen**

Professor of Private Law

School of Law, University of Edinburgh

[hector.macqueen@ed.ac.uk](mailto:hector.macqueen@ed.ac.uk)

published in

Nick Kuenssberg (ed)

*Argument amongst Friends: Twenty-five years of Sceptical Enquiry*

(David Hume Institute, Edinburgh, 2010), pp 9–14.



This text may be downloaded for personal research purposes only. Any additional reproduction for other purposes, whether in hard copy or electronically, requires the consent of the author(s). If cited or quoted, reference should be made to the name(s) of the author(s), the title, the number, and the working paper series

© 2011 Hector MacQueen

Edinburgh School of Law Working Paper Series

University of Edinburgh

**Abstract**

A comment on David Hume's probable analysis of the idea of intellectual property, suggesting that he would not have recognised it as a form of property and arguing that in the modern reform of the law in this area property rhetoric should be treated with suspicion.

**Keywords**

Law and economics, David Hume, Intellectual property, Copyright, Digital Economy Act 2010.

## **Law-and-Economics, David Hume and Intellectual Property**

My first introduction to The David Hume Institute came about as a result of meetings I had in the University of Edinburgh with Professor Gordon Hughes around 1987-88. Gordon was the Professor of Economics; I was the Associate Dean of the Faculty of Law; and the subject of our discussion was the joint degrees in law and economics.<sup>1</sup> We were exploring how to move the degrees on from being ones that were 50% law and 50% economics into something at least in part genuinely law-and-economics, with the economic analysis of law its central intellectual focus. That exploration ultimately ended in failure; but within a few weeks I had instead been introduced to Alan Peacock and his then-fledgling Institute, housed in what was still the Heriot-Watt building in Chambers Street. There I received a commission to write something for the Institute on intellectual property. A year or so later, *Copyright, Competition and Industrial Design* hit the bookstalls: a lawyer's attempt to analyse a technical bit of law with perspectives from history, economics and a policy point of view. And within another couple of years I found myself Alan Peacock's successor as Director of the Institute, trying to find other people willing to discuss the law and legal system in a similar way and to fulfil the objective stated in Alan's visionary proposal of 1983: "a policy research centre which concentrates, though not exclusively, on forging links between economists and law with the primary aim of improving understanding of both short and long term problems of implementing sensible economic policies."<sup>2</sup>

It must be for others to judge the success or otherwise of those efforts through the 1990s. Certainly we touched upon a wide range of subjects: for example, the economics of the court system itself, regulation, privatisation and competition law, corporate governance, the development of the constitution, electronic commerce, insider dealing, sex equality, divorce, and international criminal law on money laundering, drug trafficking and the regulation of the chemical industry. I certainly think we looked into the future in ways that few others were doing at the time. So, for example, back in 1994 we were discussing, not only the place of Scotland in the United Kingdom constitution long before the 1997 General Election brought New Labour to power at Westminster, but also law on the electronic frontier, when the word "Internet" was only just beginning to enter popular consciousness and was thought to be

---

<sup>1</sup> An LLB in Law and Economics and an MA in Economics and Law. The degrees are still available today in Edinburgh University.

<sup>2</sup> The proposal was reprinted in N Kuenssberg and G Lomas (eds), *The David Hume Institute: The First Decade* (1996). The quotation is at para 2.4.

essentially the computer “geek’s” playground, not a place for serious people, business, politics or law. Naturally that was the first of our publications to appear on the Internet, at much the same time as it came out in book-form. Coincidentally or not, it was also the first (and, I fear, the only) publication from my directorship to sell out completely!

Looking back from my present vantage point as a Scottish Law Commissioner and Professor of Private Law, I think my main regret is not to have dealt more with issues of private law; that is, with topics like property, contract and what Scots lawyers call delict and English ones tort, affecting the relationships of private individuals with one another rather than with the state. After all, David Hume himself had seen these subjects—or as he described them in the *Treatise of Human Nature* (Book III Part II Section VI, 1740), the stability of possession, its transference by consent, and the performance of promises—as the core of a system of justice. Could we have been more Humean in our approach, more systematic in our inquiry into the basics of law and legal systems? We did not lack for modern exemplars: the writings of such luminaries as Ronald Coase, Richard Posner, William Landes and Anthony Ogus are well-known and have opened up many shafts of light in what remains a rich seam of possibilities.

Take my own field of copyright, for example (appropriately enough since 2010 is the tercentenary of the coming into force of the very first Copyright Act as well as the 25th anniversary of The David Hume Institute). This remains as hotly contested an area of public policy as it was in 1710, as seen most recently in the United Kingdom in the debate over the Digital Economy Bill, finally passed into law in the Parliamentary “wash-up” after the General Election was called in April 2010. Battle rages in the worlds of recorded music, films and printed matter on how to deal with the Internet consumer who prefers downloading or streaming the product to her computer or mobile device over the traditional methods of distribution. The rhetoric of property is frequently used: the creators of the material are legally and morally its owners, it is said, and use of that property by others without the owners’ consent is theft. Seeking payment before consenting to others’ use is the only way in which creative people can make a return from their creativity, and without that return the wells of creativity will dry up and society will be deprived of the benefits that have long flowed from them. And from this perception springs the potentially draconian solution of the new legislation, under which the repeat unlicensed user will not merely be liable to the copyright owner for the wrongs he commits but will also be subject to the sanction of disconnection from the Internet as the instrument of his wrongdoing.

As I pointed out in *Copyright, Competition and Industrial Design*, in Hume's writings there is nothing specific about copyright, even although it was (as ever) a fiercely controverted subject in his own lifetime and one in which, as a published author, he had a direct personal interest.<sup>3</sup> But something can perhaps be inferred from what he did say on the subject of property. For Hume, justice was an artificial rather than a natural virtue, the product of man's experience of and preference for social living, albeit driven by self-interest as a "more artful and more refined way of satisfying" individual passions. Property and its transference by consent alone was likewise an artificial creation, designed by man to ensure that society held together and was not destroyed by the individual's tendency towards entirely selfish action and appropriation.

So far so good for the arguments in support of copyright as a form of property: indeed, the invention of copyright at the beginning of the eighteenth century can illustrate precisely Hume's point about the artificial nature of property as a device for the betterment of society and the "artful" promotion of self-interest, in this case that of the authors and other creators protected by the new right and so encouraged to produce social benefit because that will bring them reward. But Hume's subsequent discussion of the nature of property begins to raise questions about the notion of property in new creations. For him *stability of possession* was the key element in establishing the existence of property; and this was further developed by ideas of *occupation* (what constitutes taking possession), *prescription* (the right-affirming effect of the passage of time without challenge to the possession), *accession* (the addition of matter to the original object such as the fruits of our garden or the offspring of our cattle which become our property even without possession), and *succession* (the transfer of a deceased's property to the next generation). Hume however rejected the justification of property commonly used in relation to copyright and other forms of intellectual property, a theory most often associated with Hume's philosophical predecessor, John Locke; that is, the labour theory by which I own what is produced by my labour. Hume wrote:

"Some philosophers account for the right of occupation, by saying, that everyone has a property in his own labour; and when he joins that labour to anything it gives him the property of the whole. But, (1) there are several kinds of occupation, where we

---

<sup>3</sup> It may be that the *Treatise of Human Nature* was published too early (1739-40) for Hume to take account of the copyright "battle of the booksellers", which only became intense from the mid-1740s on.

cannot be said to join our labour to the object we acquire; as when we possess a meadow by grazing our cattle upon it. (2) This accounts for the matter by means of *accession*; which is taking a needless circuit. (3) We cannot be said to join our labour in anything but in a figurative sense. Properly speaking, we only make an alteration on it by our labour. This forms a relation betwixt us and the object; and thence arises the property, according to the preceding principles.” (*Treatise of Human Nature*, Book III, Part II, Section III note).

At best, then, the creative person began to gain property in the medium on which the creation was first expressed. The idea of ownership of what had been created, as distinct from the material on which it had been composed, was simply outside Hume’s conception of property.

As I will show elsewhere in a forthcoming article,<sup>4</sup> this difficulty for Hume in the notion of *intellectual* property was expressed more directly by some of his Scottish Enlightenment contemporaries such as Adam Smith and Lord Kames. They preferred to see copyright (and patents) as grants of particular (or “exclusive”) privileges by the state to individual subjects which created markets that otherwise would not exist, because it was in the public interest that they should. But the grants were carefully limited—for example, to specific periods of time—to avoid or minimise the possible ill-effects of the private monopolies to which they gave rise. As Kames put it: “the profit made in that period is a spur to invention: people are not hurt by such a monopoly, being deprived of no privilege enjoyed by them before the monopoly took place; and after expiry of the time limited, all are benefited without distinction.” (*Principles of Equity*, 3rd edn, 1778, vol 2, 99). There were analogies with property, but the analogy should not mislead one into attributing all the absolute effects of property to the rights created by the privileges. These were granted for the public good, and in the same name could be—and were—much more restricted in scope than outright property.

Today we have travelled a long way from the eighteenth century and Enlightenment debates about the nature of property and intellectual property; but there are still important insights in that discussion from which we can draw lessons for today’s policy-makers. Above all,

---

<sup>4</sup> “Intellectual Property and the Common Law in Scotland c.1700-c.1850”, in L Bently, G D’Agostino and C Ng (eds), *The Common Law of Intellectual Property: Essays in Honour of David Vaver* (Hart Publishing, Oxford, 2010).

perhaps, it is vital not to be taken in by use of property rhetoric when we consider what is to be done to address the problem of file-sharing or other copyright issues. Hume's scepticism about the natural-ness of property, somehow or other antecedent to any other interest, and his identification of it as merely an artifice designed for the benefit of society, must be taken on board. In particular, his rejection of the idea that property claims flow from labour (or creativity) remains wholly convincing, and is confirmed with only a moment's thought from our general experience in everyday life. If that is right, then we must also accept that the creator as such has no claim beyond that given by the legislation in force at the time of the creation, and that that claim was and remains shaped by consideration of the public rather than the individual interest.

None of this is to say that the file-sharer should after all be given the green light to continue on his merry and copyright-infringing way; but it may suggest that the hasty passage of punitive legislation to support the claims of copyright holders was unduly influenced by ideas of property and theft rather than by consideration of more mundane questions about the extent to which the flow of creative production is in fact threatened by unlicensed file-sharing. As the late Neil MacCormick pointed out in his Hume Lecture in 2006, Hume shared his view that "the idea that you can make your laws without long and careful deliberation is, I think, a dangerous one."<sup>5</sup> Neither man would have applauded the ludicrous "wash up" procedure which inflicted upon us the Digital Economy Act 2010. There was instead—and there still is—a need for thorough investigation and analysis of the evidence about what is really happening in the music recording industry and its marketplaces, set against a considered view of the basic policy requirements underpinning the existence and content of copyright law. There is, in other words, the kind of project for which the work of The David Hume Institute has provided rigorous parameters in the past and should carry on doing so in the future. And the insights of our eponym with which Immanuel Kant's dogmatic slumbers were so fruitfully interrupted (*Prolegomena to Any Future Metaphysics*, 1783) can continue to develop our policy thinking in fields which Hume himself could scarcely have envisioned.

Hector MacQueen

Trustee of The David Hume Institute

Scottish Law Commissioner

---

<sup>5</sup> Neil MacCormick, *The European Union and the Idea of a Perfect Commonwealth* (Hume Occasional Paper No 68, 2006), p 17.



Professor of Private Law, University of Edinburgh